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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-782

THE GREAT WESTERN SUGAR COMPANY,
Petitioner,

v.

DAVIS CATTLE COMPANY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is unreported and appears as Appendix B to the petition for certiorari. The opinion of the district court is reported at 393 F. Supp. 1165 and appears as Appendix A to the petition for certiorari.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1976. A timely petition for rehearing *en banc* was denied on October 26, 1976. The petition for certiorari was filed on December 9, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether in a breach of contract case brought in the federal court on the basis of diversity of citizenship, the district court and the court of appeals properly interpreted Colorado law in awarding damages.

2. Whether this Court should reconsider and reverse the longstanding doctrine of *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941).

STATEMENT OF THE CASE

Introduction

This breach of contract case was brought in the United States District Court for Colorado as a diversity action. Applying Colorado law, the district court found that petitioner, The Great Western Sugar Company, had breached a contract and was guilty of fraud in dealing with respondent, a sugarbeet grower, and with members of a class represented by respondent. The district court awarded damages to the class and the court of appeals unanimously

affirmed. Neither court decided any question of federal law.

Statement of Facts

The Great Western Sugar Company ("Company") is engaged in the manufacture and sale of sugar and by-products from sugarbeets. The Company annually contracts with farmers to grow sugarbeets for the Company. The standard contract establishes a sharing arrangement under which the amount a grower receives for his beets is determined by the amount of money the Company receives, over a twelve-month period, from the sale of the sugar extracted from the beets. Each year, the growers deliver their beets to the Company in the fall. At that time, the Company is required under the contract to make an "initial" payment to the growers based upon what it projects will be received from the sale of the sugar over the next twelve months. At the end of the twelve-month period, when all of the sugar has been sold, the Company calculates the final amount due the growers and pays them any amount due over and above that received as an "initial" payment and any interim payments.

This case involves the adequacy of the "initial" payment made to the growers in the fall of 1974. The contract provides that the "initial" payment

> "shall be at the highest rate per ton that the Company may deem to be justified taking into consideration anticipated returns from the sale of sugar and the sugar content of beets." (Pet. App. F, 75a).

On November 20, 1974, the Company made an "initial" payment to the growers of $26.25 per ton of beets. Under a complex formula contained in the contract, that amount was the equivalent of a selling price of $14.35 per hundred pounds of sugar. Respondent sued claiming that the "initial" payment was inadequate under the contract since, on the very day of the payment, the Company was selling sugar for more than $60 per hundred pounds and was estimating a yearly average of between $40 to $53 per hundred pounds.

After a non-jury trial, the district court found that the Company breached its contract with the growers. It found that the Company, in making the "initial" payment, failed to consider "anticipated net returns for the sale of sugar" as the contract required. As an additional ground, the district court found that the Company "was guilty of fraud or such gross mistake as necessarily implies bad faith or a failure to exercise an honest judgment" in fixing the amount of the "initial" payment. (Pet. App. A, 17a; *see also* 21a-22a). The district court then determined that the Company underpaid the growers by $74 million. By thus shortchanging the growers, the Company deprived them of the use of that money and, the evidence showed, saved itself 11½% interest on the $74 million which it would have been required to borrow. (Pet. App. A, 54a).

The district court, after an exhaustive review of Colorado authorities, held that the growers were entitled to "moratory" interest, or interest as damages, on the money wrongfully withheld. (Pet. App. A, 29a-51a). Under Colorado law, the proper measure of damages was the "benefit" to the Company. *Bankers Trust Co.* v. *International Trust Co.*, 108 Colo. 15, 113 P.2d 656 (1941). (Pet. App. A, 52a-54a). The court of appeals unanimously affirmed. (Pet. App. B, 59a-69a).

ARGUMENT

1. The decision of the court of appeals, affirming a decision "of purely local law by a [Colorado] federal judge of long experience," *McGregor* v. *State Mutual Life Assurance Co.*, 315 U.S. 280, 281 (1942), was manifestly correct. The decisions below were based upon a number of well-established Colorado authorities which support the award of interest as damages for money or property wrongfully withheld.[1]

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[1] *See* cases discussed by the district court at Pet. App. A, 41a-51a and in particular *Browne* v. *Steck* 2 Colo. 70 (1873); *Beckwith* v. *Talbot*, 2 Colo. 639, *aff'd*, 95 U.S. 289 (1875); *Omaha & Grant Smelting and Ref. Co.* v. *Tabor*, 13 Colo. 41, 21 P. 925 (1899); *Bankers Trust Co.* v. *International Trust Co.*, 108 Colo. 15, 113 P.2d 656 (1941); *Deeb* v. *Canniff*, 29 Colo. App. 510, 488 P.2d 93 (1971); *Martinelli* v. *Merchants Oil, Inc.*, 470 P.2d 55 (Colo. App. 1970); *Montgomery* v. *Tufford*, 165 Colo. 18, 437 P.2d 36 (1968). *See also* Spiecker and Ruland, *A Creditor's Right to Interest in Colorado*, 35 U. Colo. L. Rev. 190, 200, 202 (1963).

Petitioner's argument that those cases all involved liquidated claims (Pet. 4, n. 4) and provide no support for the award of damages here was properly rejected by both courts below.

In affirming, the court of appeals said:

> "The trial court * * * reviewed quite fully the Colorado law on the subject and concluded that Colorado had adopted the moratory interest concept. We agree. The trial court relied heavily on Bankers Trust Co. v. International Trust Co., 113 P.2d 656 (Colo. 1941), which case was itself cited with approval by this court in Phillips Petroleum Co. v. Oldland, 187 F.2d 780, *cert. denied*, 342 U.S. 816 (1951). The trial court's reliance on these cases was in our view well founded. We agree with the trial court that Colorado law permits an award of moratory interest in a situation of this type." (Pet. App. B, 68a).

In short, the decision below is based upon Colorado authority as developed in the Colorado state courts and as applied by the Tenth Circuit.[2] It was rendered by a tribunal with expertise in the laws of the states comprising the Tenth Circuit. *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701, 707-708 (1949).[3] This is hardly the exceptional case warranting a departure from this Court's settled practice of "not re-

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[2] The Colorado cases relied on by petitioner (Pet. 5, nn. 5, 6) are clearly inapposite. None involves a claim for interest as damages for money due and owing but not paid. Furthermore, those cases involved the availability of interest under a Colorado statute, a basis for recovery not relied upon in this case.

[3] All three members of the court of appeals panel are members of the Colorado bar. Two of the panel members, including the author of the opinion, served as justices on the Colorado Supreme Court.

view[ing] . . . the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944) (citation omitted); *see also Bishop* v. *Wood*, 44 U.S.L.W. 2820, 2821-22 & n.10 (U.S., June 10, 1976).

Petitioner's argument that the court of appeals should have exercised its discretion to certify the issue of interest as damages to the Colorado Supreme Court is frivolous. Although this issue was prominent early in the proceedings in the district court (*see* Pet. App. A, 30a), petitioner chose, at that time, not to request that it be certified to the Colorado Supreme Court. The belated effort to raise the issue in the court of appeals was nothing more than an attempt to delay the litigation and to shop for another forum. That is ground, in and of itself, to refuse certification. *Meredith* v. *Winter Haven*, 320 U.S. 228, 237 (1943); *Lehman Brothers* v. *Schein*, 416 U.S. 386, 395 (1974) (Rehnquist, J., concurring). In any event, under Colorado Appellate Rule 21.1, a question of state law should be certified only if "there is no controlling precedent in the decisions of the [Colorado] Supreme Court." As the opinions below demonstrate, there were numerous "controlling precedent[s]" to govern this case.

2. Petitioner's invitation to the Court to reconsider the well-developed doctrine of *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941), is equally frivolous. The issue was neither raised nor

decided below. Moreover, only last Term, this Court reaffirmed *Klaxon Co.* in summarily reversing the Fifth Circuit for departing from this "longstanding decision". *Day & Zimmermann, Inc.* v. *Challoner*, 423 U.S. 3, 4 (1975). Petitioner has offered no persuasive reason to revisit *Klaxon Co.*

CONCLUSION

Petitioner has presented no reason why this Court should grant certiorari to review the state law issues decided in this breach of contract case. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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